

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS
ANTITRUST LITIGATION

Case No. 12-02311

Hon. Marianne O. Battani

THIS DOCUMENT RELATES TO:

All Actions

MOTION ON DISCOVERY ISSUES

CONCERNING HONDA DEALERSHIPS' DATA

BEFORE SPECIAL MASTER GENE ESSHAKI
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Monday, May 8, 2017

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1 Detroit, Michigan

2 Monday, May 8, 2017

3 at about 1:30 p.m.

4 - - -

5 (Special Master and Counsel present.)

6 SPECIAL MASTER ESSHAKI: We are calling the matter
7 of Master File No. 12-02311, and that is the only case file
8 that I have on this. This is In re: Automotive Parts
9 Antitrust, In re: All Parts, this matter relates to all
10 actions.

11 This is the issue regarding potential production of
12 data by the Honda OEM regarding dealership information that
13 they may have filed with Honda and that being produced in
14 this case.

15 So who wants to start in this matter?

16 MR. RAITER: I think it's your motion.

17 SPECIAL MASTER ESSHAKI: Okay. Please identify
18 yourself, sir.

19 MR. O'SHEA: Kevin O'Shea of the Miller firm on
20 behalf of the end payor plaintiffs, Your Honor.

21 SPECIAL MASTER ESSHAKI: Very good, Mr. O'Shea. If
22 you will please begin.

23 MR. O'SHEA: So we are here under unusual
24 circumstances, Your Honor. I think you, yourself, just used
25 the phrase potential production. So we are here talking

1 about data that is going to be produced by Honda, but as far
2 as I can tell, there is no threat that there is any allegedly
3 confidential information that will be disclosed if Your Honor
4 doesn't make a ruling today. In fact, all of the parties are
5 in agreement that all of the information designated as
6 confidential will be treated that way pursuant to the Court's
7 orders, so there is no issue to decide today regarding
8 confidentiality. The only scenario in which there would be
9 an issue is if one of the parties determines that the
10 information once produced is going to be attached to a filing
11 in the case, and we have no idea whether that's even going to
12 happen.

13 So whether Your Honor treats this as unripe or
14 premature or uses some other term, I think what it boils down
15 to is there isn't really a controversy that needs to be
16 resolved here today. And that's made very clear by
17 Judge Battani's sealing order that she entered in February.
18 That was less than 90 days ago, and here we are back here
19 debating what Judge Battani already disposed of. She already
20 decided that a determination regarding whether materials
21 should be sealed from public view forever will be made at the
22 time of the filing, not at the time of production. And I've
23 had occasion to read over the order several times in the past
24 few days, and it references the term filing over 40 times in
25 the first three paragraphs, so there's nothing ambiguous

1 about the order. In fact, the title of the order is
2 stipulated order regarding sealed filings, that's what the
3 order is talking about, and I think that's the real reason we
4 are here today because the dealers hope to persuade Your
5 Honor to eviscerate Judge Battani's order. They make the
6 extraordinary argument that the order should be rewritten to
7 require that the decision on whether to seal materials should
8 be made at the time of production, not at the time of filing,
9 if that happens at all, which is precisely the opposite
10 protocol that Judge Battani imposed.

11 In fact, the dealerships make that argument
12 explicitly in their sur-reply brief. Let me read to you from
13 their brief at page 3, Your Honor, because I think it is very
14 important. Quote, the determination to treat third-parties'
15 information as confidential and to order that it be redacted
16 if used in a public filing makes sense to decide now when the
17 information is being produced. The alternative that the
18 opposing party suggests -- and they go on to detail some
19 logistical horrors that they think would happen if we waited
20 until the time of filing, but what strikes me in this, Your
21 Honor, is their reference to the alternative is actually a
22 reference to the protocol we currently have. The alternative
23 is Judge Battani's order that this is to be determined at the
24 time of filing, not at the time of production.

25 In fact, what they would like to do is make the

1 filing date insignificant so that the only date that matters
2 is the date of production which, again, is completely
3 contrary to what Judge Battani has said.

4 So I would like to briefly touch on two main
5 arguments against rewriting Judge Battani's order. First, it
6 is not Your Honor's role to step in and completely reverse
7 what Judge Battani said less than 90 days ago. And second,
8 even if that were the role of Your Honor, there is no
9 evidence in the record supporting such an act. The
10 dealerships have proceeded with the assumption that Your
11 Honor has the authority to rewrite the sealing order but it
12 is not apparent that such a result is appropriate or even
13 possible in this forum. It would plainly go far beyond Your
14 Honor interpreting or applying Judge Battani's order to a
15 specific fact situation, which my understanding is you've
16 done all along with the orders from the Judge.

17 This is about effectively flipping the order on its
18 head so that the cardinal distinction she makes in the order
19 between production and filing simply disappears. And with
20 respect, I'd suggest that Your Honor is not in a position
21 today to make that decision, that's an argument properly
22 before Judge Battani, and it should be made in a motion to
23 Judge Battani. Her order is the order that is at issue.

24 Now, when pressed in pleadings the dealers argue
25 that you have the authority to alter the order for two

1 reasons. First, they say that you previously ordered OEM
2 data sealed prior to the filing stage, and, second, they say
3 that your ordered discovery-related filings would not be
4 subject to Judge Battani's order.

5 As to the first argument which we have detailed in
6 our briefing, the data at issue in the OEM situation was far
7 different than the data here. There is no argument that the
8 sales data that Honda is producing includes anything like a
9 pricing methodology or information that could be
10 characterized as truly secret; it is just sales data. And
11 that order was entered before Judge Battani's sealing order.

12 The dealerships have argued that it was negotiated
13 simultaneously with the sealing order so the two must fit
14 together, they must be consistent, but I think that misses
15 the point entirely. What it means is that anything that Your
16 Honor does now, today, or in the future, must comply with
17 Judge Battani's sealing order because that's now in place and
18 it has been in place since February 27th. That wasn't true
19 of your prior order regarding the OEMs.

20 Now, with regard to the second argument about the
21 discovery, it's disingenuous to assert that your order
22 regarding the discovery materials is somehow inconsistent
23 with Judge Battani's order. In fact, I have her order here,
24 Your Honor, and the very last paragraph of the order,
25 paragraph 10, specifically notes that one of the parties

1 anticipates filing a motion to exclude discovery-related
2 filings. She says and allowing such filings to be made under
3 seal pursuant to an applicable protective order with no
4 further motion. In the event that such a motion is granted
5 this stipulation shall not apply to such discovery-related
6 filings. Until such motion is ruled on, discovery-related
7 filings will not be subject to the requirements of this
8 stipulation.

9 So Judge Battani already knew when she entered this
10 order that the issue of discovery-related materials was
11 carved out. And what you ruled, Your Honor, with regard to
12 those materials, which she anticipated, was entirely
13 consistent with this order because she did specifically carve
14 that out.

15 But, Your Honor, even if you could rewrite the
16 sealing order I think there is a second reason -- a second
17 argument against doing so, and that's that there's no factual
18 or legal justification to go forward with such a drastic
19 action.

20 Your Honor is probably familiar with the adage that
21 extraordinary claims or arguments require equally
22 extraordinary support, I think that's been attributed to
23 Carl Sagan, but it applies here in spades because the
24 dealerships have -- are making an extraordinary request that
25 you rewrite and essentially reverse Judge Battani's protocol

1 less than 90 days after it was approved and stipulated to by
2 the parties.

3 So let me engage in a brief foray into the history
4 of the sealing order because I think it's very instructive.
5 Judge Battani was motivated by the Sixth Circuit's decision
6 in Shane that the over sealing of materials in a class action
7 can be a basis to vacate class settlements. So last fall she
8 ordered the parties to confer and create a process for
9 sealing that would avoid the Shane problem of blanket sealing
10 without specific showings on specific data, and the parties
11 did it. They agreed on a process, presented it to
12 Judge Battani, she approved and adopted it, and that's what's
13 in her order of February 27th.

14 In doing so she balanced the concern regarding the
15 Shane outcome, which is a true catastrophe for class action
16 settlement; after years of hard work to reach a resolution a
17 case goes to the Sixth Circuit and suddenly it comes back
18 down because over sealing occurred. And she balanced that
19 against the legitimate concerns parties always have in
20 litigation about confidentiality. She made that balance and
21 that's embodied in the order.

22 So what are their arguments for rewriting the
23 order? Well, it is difficult to discern because we are
24 operating a bit in the dark here, Your Honor. We are talking
25 about materials you said which are potentially produced so we

1 don't know exactly what we are talking about, but what we do
2 know is it appears to be routine sales data, that's what
3 Honda was ordered to produce and that's what they say they
4 are going to produce. Contrary to the assertions of -- in
5 the briefs, there is no personal consumer information
6 involved, there will not even be VIN numbers. So push that
7 aside and realize that the only argument they are making is
8 that out of thousands of dealers who are contacted, four
9 dealers asserted that there would be confidential business
10 information in the materials. This is information that's all
11 voluntarily reported to Honda either directly or indirectly
12 by the dealers already. Very importantly, Your Honor, there
13 is no indication that Honda has any legal obligation to keep
14 that information confidential, and there is no dispute that
15 individual consumers are provided with the information by the
16 dealerships on a routine basis. So we argue that any right
17 to confidentiality there could have been has been waived on
18 that basis. But in any event, there is no evidence in the
19 record that any of the information is entitled to be sealed
20 from public view.

21 The declaration of Mr. Waikem, which opposing
22 counsel relies on, is repeatedly vague on this point. It is
23 not even clear, Your Honor, that Mr. Waikem is talking about
24 the same data that Honda intends to produce, they don't match
25 up clearly. I believe that declaration is conclusory and

1 therefore unsupported.

2 But even if the data matches up there is no showing
3 of any substantial harm to the dealerships if it happens to
4 be disclosed and, again, there's no risk of any disclosure at
5 this point, Your Honor. There is no reason why we can't
6 delay a determination about what should be disclosed to be
7 consistent with Judge Battani's protocol.

8 And that's the real comparison to be made here. It
9 is not whether the information is public or nonpublic, it is
10 whether we make the determination about whether it should be
11 nonpublic today at the time of production or at the time of
12 filing as Judge Battani has indicated.

13 And weighing against all of this, these vague
14 assertions that there would be harm from this information
15 being revealed is the real-world risk posed by the Shane
16 decision that motivated the order in the first place: Over
17 sealing information that class members may legitimately need
18 to view in order to evaluate a proposed settlement.

19 The measured solution is clear and that's to make
20 the sealing determination on a case-by-case basis at the time
21 of filing, if that even comes to pass. In other words, Your
22 Honor, a wait-and-see solution. What we are talking about
23 here, after all, is merely a matter of timing. All the
24 parties always have a right to be heard on the issue of
25 sealing materials. Judge Battani has made it clear that the

1 timing should be at the time of filing, not production, and
2 there is no harm to the dealerships to wait until that time,
3 and certainly no compelling reason to overturn the protocol
4 that Judge Battani carefully adopted.

5 At the very least, Your Honor should hold off on
6 making a ruling until there has been a production and we know
7 for sure what information has been presented. We can compare
8 it to what the dealers think is going to be considered, and
9 then Your Honor can make a determination about when the
10 sealing should take place at a later time. So I think it is
11 very clear that the wait and see approach is most reasonable,
12 it is to the most judicious thing to do today, and I think it
13 is the approach that is most consistent with Judge Battani's
14 order.

15 SPECIAL MASTER ESSHAKI: Counsel, I recall quite
16 clearly the ruling because it came at the end of several long
17 days of mediation trying to get some solutions to some very,
18 very complicated issues. At the time Honda said we want
19 to -- somebody suggested that we want to give the dealers an
20 opportunity -- the Honda dealers an opportunity to object to
21 the production of this data because it is their data, it is
22 not Honda's data, but I was told at that time that there was
23 no personal data, there were no names, there were no
24 addresses, there were no VIN numbers as to the vehicles. In
25 the pleadings that I've received today I understand now that

1 there are VIN numbers, there are names, there are addresses,
2 there are sex designations, male, female, so forth. Do you
3 have any idea?

4 MR. O'SHEA: No, Your Honor, and that points to one
5 of the issues we've got here today. We are operating in the
6 dark and you're being asked to make a decision about data
7 that hasn't been produced. We are guessing about what's in
8 the data. It seems to me in order to move forward you at
9 least need to know what Honda is actually producing, where
10 the information came from, was it shared with them from the
11 dealers, and does it contain personal information. If it
12 does, obviously we would make stipulations on that point, but
13 it raises a different issue than purely commercial
14 information.

15 SPECIAL MASTER ESSHAKI: That's where I was going
16 next. If it does contain consumer identities, addresses, VIN
17 numbers and/or profit per vehicle attributed to a dealership,
18 should that be protected?

19 MR. O'SHEA: With regard to the last item, Your
20 Honor, I'm not certain. With regard to the personal
21 information, certainly we would have no objection to editing
22 that material out but again --

23 SPECIAL MASTER ESSHAKI: How, how do we do that?

24 MR. O'SHEA: Through a redaction process that you
25 could design, Your Honor, but, again, that's something that

1 should take place at the filing stage. I think one of the
2 faults in the approach that's being proposed by opposing
3 counsel is that you are being asked at the production stage
4 to act in the dark. At least at the filing stage we have had
5 an opportunity to view the information and digest it,
6 everybody knows what we are working with, and then when you
7 make a determination, at that point you are operating with
8 all the information you need in order to make a decision.

11 MR. ROWE: May I be heard for the defendants?

12 SPECIAL MASTER ESSHAKI: Please, please. I will be
13 glad to entertain any argument by anyone.

14 MR. ROWE: David Rowe, Your Honor, for the
15 defendants today.

16 Mr. O'Shea eloquently presented our position. I
17 just wanted to add one clarification, and it goes in response
18 to the question you just asked about what's in the data and
19 might it contain personal information that we might be
20 concerned with. Although it is an interesting and important
21 question, may I suggest it's not really the relevant
22 question. The question isn't what might Honda produce, the
23 question really is down the road what might someone actually
24 file with the Court.

Now, the data that Honda will produce is most

1 certainly going to go to experts who will crunch their
2 numbers and develop reports. Because this hasn't happened
3 yet we don't know exactly what an expert report might have in
4 it but we've all seen a bunch of expert reports and we've
5 seen their supporting data, and it is not crazy to suggest
6 that whatever might be in an expert report that might one day
7 be filed would not be so specific as to contain the personal
8 information that Your Honor is concerned about, information
9 that, of course, we don't even know if it will be produced in
10 the first instance but, as I said, the more important
11 question is what might be filed. And that, Your Honor, is
12 precisely why today is not the day for you to rule that
13 whatever might be filed in the future has to be sealed, that
14 question should be asked and answered at the time that it is
15 sealed.

16 Let me also add right quick that from the
17 defendants' perspective if an expert down the road wanted to
18 file something that has support in it that truly contained
19 sensitive personal information, the defendants are not going
20 to oppose anyone's request to seal that information. The
21 only reason we are today opposing what the auto dealers have
22 requested is because if settlements are reached we want them
23 to stick.

24 Judge Battani has done two things sua sponte within
25 the last couple of months or maybe six months. First she

1 raised Shane Group on her own and asked the parties to
2 address it. Second, sua sponte, she raised the idea of a
3 settlement facilitator. It's pretty clear that the Court,
4 being Judge Battani, wants these cases to settle and she
5 wants the settlements to stick.

6 I think what the auto dealers are doing today is
7 inviting error and huge risk that we won't be able to carry
8 out in Judge Battani's wishes.

9 SPECIAL MASTER ESSHAKI: Thank you, sir.

10 Mr. Raiter --

11 MR. RAITER: Thank you, Your Honor.

12 SPECIAL MASTER ESSHAKI: -- were you able to attend
13 the festivities yesterday?

14 MR. RAITER: I was, and she went through with it
15 which was good. We weren't sure with our eight-year-old
16 whether she was going to receive her First Holy Communion,
17 but she did it, so we were happy with that, and I was able to
18 make it. I appreciate you accommodating --

19 SPECIAL MASTER ESSHAKI: May I suggest something
20 that is going to sound absolute crazy to you but it is so
21 true, it will be a blink of an eye when you are walking her
22 down the aisle.

23 MR. RAITER: At times I look forward to that. With
24 this daughter she is challenging, to say the least, she is
25 other own little person.

1 SPECIAL MASTER ESSHAKI: It has been my experience
2 that daughters love their dads a little.

3 MR. RAITER: She is fantastic. What I tell people
4 is when she is 25 years old her personality traits will serve
5 her well in the world, until then she's going to drive her
6 mother and father crazy.

7 SPECIAL MASTER ESSHAKI: That's her job. Thank
8 you, sir.

9 MR. RAITER: Yes. So --

10 SPECIAL MASTER ESSHAKI: You may proceed with your
11 argument, Counsel.

12 MR. RAITER: Thank you. So we are not asking you
13 to rewrite the Judge's sealing order, by any means. This
14 information -- it's kind of an awkward situation; we have the
15 defendants and the end payors both saying well, go ahead and
16 produce the dealers' information, let's see what it looks
17 like and we will deal with it later. If we had ever
18 suggested that be the process for the defendants' information
19 in this litigation you could imagine how many people would be
20 in the courtroom screaming to high heck about that process.
21 It is the proverbial fox in the henhouse here.

22 The problem we have here is that Honda concedes
23 that the data that it will produce is our data, it is not
24 Honda's data, it is not the defendants' data, it is not the
25 end payors' data, it's ours or the Honda's dealerships. That

1 information does, in fact, according to e-mails provided by
2 counsel for Honda, seem to be likely to include VIN numbers,
3 gender, age, zip codes, and most assuredly includes price of
4 vehicles, gross and net profit, which Your Honor has
5 previously ruled is information that is highly confidential
6 under the protective order in various settings.

7 So really what the defendants want when we hear
8 counsel talk about experts, the data, et cetera, what they
9 want is the pricing and the sales data; they want the profit,
10 the net profit, the gross, and that's what they are going to
11 use, and that's the very data that has already been covered
12 by various orders that you have issued in this litigation,
13 and it should be treated the same way here.

14 Fundamentally Honda has said hold on, you guys need
15 to figure this out, please go get some direction from the
16 Court, it's your data, we don't want to do anything. We need
17 from you an order that says when they produce this
18 information it shall be designated highly confidential and it
19 shall be treated as highly confidential.

20 That then leads us to well, what do you do with it
21 for filing in the future? And Shane says a number of things,
22 and what Shane really says when you read the decision is
23 listen, the Court has to make findings, it has to actually
24 look at the data, it can't just allow the parties to make
25 willy-nilly filings under seal. In Shane there were some

1 very important filings that the objectors wanted to see, that
2 the Court had not made any specific findings about and the
3 Sixth Circuit said you need to go back and redo that.

4 Judge Battani on April 19th when she just heard
5 final fairness and considered objectors who raised Shane in
6 this litigation, she rejected their objections, she said no,
7 the information here has not been filed en masse under seal,
8 and the things filed under seal and remain under seal were
9 not pertinent to the settlement amount or the settlements at
10 issue, and therefore you objectors don't even have a basis
11 for raising a Shane objection.

12 What we have here right now is data that hasn't
13 been produced yet, we are right about that. We generally
14 know what it is; Honda has told us it is essentially the
15 final price of the vehicles. There is vehicle information
16 about what it was, model, trim, options, gross and net
17 profit, the terms of the purchaser lease is in there, and
18 also potentially gender, age, zip code of purchase and other
19 information that would allow somebody really great
20 information.

21 If you were a Toyota dealer and you had all of that
22 information about Honda sales and Honda dealerships you would
23 be well armed to compete with Honda dealerships, and that's
24 why we are so concerned about this. That information is
25 essentially what a dealership trades in; how do we sell these

1 cars, what do we make, what do we not make, what sold well,
2 where did we make profit, where didn't we make profit? By
3 providing the zip code of the purchase, that essentially
4 tells you what Honda dealership sold the vehicle most likely
5 because of the geographic contractual obligations or
6 territories that a dealership has. So this is very, very
7 important information to these dealerships, and we've raised
8 these arguments for those reasons.

9 What we can't have happen here is Honda just
10 produces it however it wishes. We don't know whether it is
11 going to designate highly confidential. It's too late if the
12 horses are out of the barn, we don't think we can get them
13 back into the barn. So, number one, it should be designated
14 highly confidential when produced. That then, of course,
15 requires people to treat it as highly confidential for
16 purposes of filings and things going forward.

17 Now, the argument today primarily was well, you are
18 going to rewrite Shane -- or you are going to rewrite the
19 Judge's sealing order, that wasn't an argument that these
20 parties made in their brief but let's address it anyway. We
21 are not asking you to do that. What we are asking you to do
22 is to say okay, if Honda is producing this information, which
23 is what we are told they are going to produce, you have
24 before you sufficient information to make findings today
25 about how to treat that information when it is filed in the

1 future.

2 What we have proposed is trying to be efficient and
3 trying to minimize future filings about the same topic. So
4 gross and net profit, for example, you have been up and down
5 that street many times in this litigation about dealerships.
6 If you know that that is likely to be contained in the Honda
7 DMS data, you, we believe, are well equipped to make a
8 finding right now about how that information would be filed
9 in the future. And obviously anyone here, us, the
10 defendants, the end payors or some objectors, some class
11 member could come to the court and ask for the information to
12 be unsealed, or maybe we unsealed it by agreement once we see
13 how it is actually produced and put into the record. Right
14 now we don't know what a defense expert will do with the
15 data. We don't know what it will look like when it goes in a
16 filing, and the problem is we have dealerships who are very
17 interested in this and very worried about this, and we don't
18 want to have to wait and see and guess what's going to happen
19 in the future with that information.

20 So we think you've been provided affidavits,
21 briefs, a number of briefs obviously, case law, and that you
22 have sufficient information before you today to make findings
23 sufficient to justify filing under seal of this data if it
24 is, in fact, filed at all, and there is a question about
25 whether it will or won't ever be filed for that matter, but

1 we are concerned about unringing the bell, getting the horses
2 back in the barn, all of those things going forward, and that
3 it makes sense to do this one time. The sealing -- the
4 timing of the sealing orders and the pricing orders, and
5 Shane, there were discussions going on -- the sealing order
6 talks about when you are filing things there is no doubt
7 about that, but here we have information that, as it is being
8 produced, it could be designated pursuant to the protective
9 order and it can be produced pursuant to instructions from
10 Your Honor about how to file this information.

11 And, again, everybody has a right to come later and
12 say, you know what, this particular information should remain
13 under seal, it should not remain under seal, but from our
14 perspective doing it right now, having some certainty going
15 forward, I think Honda would appreciate that. Certainly
16 their counsel has e-mailed and, kind of like, we're in the
17 middle of this, we don't want to be in the middle of this,
18 give us some direction.

19 If you can set the playing rules here, the ground
20 rules today, I think it would help everyone and it would
21 minimize the future impact of this data's -- excuse me. It
22 would minimize the likelihood that we are back here with
23 motion practice, either us or anyone else. What we don't
24 want to have is every time the defendants file this
25 information, let's say they do file it five or ten times, do

1 we have to come back and ask you to make the same ruling on
2 gross and net profit over and over and over again?
3 It doesn't make a lot of sense.

4 Judge Battani and you have done a great job of
5 trying to find ways to be efficient, streamlined and focused
6 going forward. Your OEM -- the OEM order on the OEM data
7 does exactly that. We are really just asking for the same
8 treatment as the same type of data that was produced by the
9 OEMs. This is being produced by a subset of the OEMs, and it
10 is a little different, but some of the same information
11 that's in the OEM pricing data and the OEM productions that
12 you've already issued an order on is really what we are
13 dealing with here. We want the same treatment of that data.

14 SPECIAL MASTER ESSHAKI: Mr. Raiter, I have a
15 couple questions.

16 MR. RAITER: Sure.

17 SPECIAL MASTER ESSHAKI: One, with respect to the
18 sealing order that -- the stipulated sealing order that the
19 Judge signed, remind me of the mechanism; somebody's filing a
20 document that contains highly confidential information, they
21 file it under seal, is the process then that they have to
22 move for permanent sealing or does somebody have to move to
23 remove the seal?

24 MR. RAITER: Somebody has to move to maintain the
25 seal.

1 SPECIAL MASTER ESSHAKI: Maintain, so that would be
2 move to permanently seal?

3 MR. RAITER: Yeah. So we would have to come in
4 each time and say here we are again on gross and net profit,
5 let's seal it again, and it seems to be not the most
6 efficient way to handle that.

7 SPECIAL MASTER ESSHAKI: All right. Second, there
8 are outstanding protective orders in this case. Is the
9 description subject to protective order attorneys' eyes only,
10 is that within the protective order?

11 MR. RAITER: Yes.

12 SPECIAL MASTER ESSHAKI: I created a new protective
13 order for expert-eyes only, correct?

14 MR. RAITER: Yes.

15 SPECIAL MASTER ESSHAKI: And that's because we were
16 banking the documents in the possession of a certain limited
17 number of attorneys?

18 MR. RAITER: Yes.

19 SPECIAL MASTER ESSHAKI: Okay. Is there a
20 distinction? If there is, what is between information is
21 subject to a protective order, attorneys' eyes only, or
22 highly confidential?

23 MR. RAITER: Well, the highly confidential is the
24 initial designator so it is essentially highly confidential,
25 attorneys' eyes only.

1 SPECIAL MASTER ESSHAKI: Is that in the protective
2 order?

3 MR. RAITER: Yes.

4 SPECIAL MASTER ESSHAKI: So you are not asking for
5 anything more than what's already there?

6 MR. RAITER: Correct.

7 SPECIAL MASTER ESSHAKI: Okay.

8 MR. RAITER: Correct. And if you give me one
9 second to confer with Ms. Romanenko, I want to --

10 SPECIAL MASTER ESSHAKI: You go get your marching
11 orders, sir.

12 MR. RAITER: So what we are suggesting and are
13 comfortable with is that you order the designation of the
14 production of the information highly confidential, attorneys'
15 eyes only. Where we have a bit of a disconnect here is that
16 we believe then that that means that this information must be
17 filed under seal going forward, and the defendants and the
18 end payors haven't agreed to that aspect of it either. I'm
19 not sure whether they agree to the highly confidential
20 designation or not.

21 In the meet-and-confer process leading up to this
22 motion, Mr. Williams indicated that -- I don't think he
23 opposed that but he said it is -- Honda will designate it as
24 such and it is Honda's idea to designate this -- or burden to
25 designate this. And I kept saying no, this is our data and

1 that's the problem, we can't just hope that Honda designates
2 it highly confidential, attorneys' eyes only, so that's why I
3 asked you earlier, that would be very important to us that we
4 have that designation from Honda that you order them to
5 produce it as such and then when the information is filed, it
6 is filed under seal and as we proposed in our brief -- or
7 briefs we think it makes sense for you to make some findings
8 right now about whether that information is properly filed
9 under seal, given what we know about what is in the data or
10 almost certain to be in the data.

11 SPECIAL MASTER ESSHAKI: Okay. Thank you, Counsel.

12 MR. RAITER: Thank you.

16 MR. O'SHEA: What do you mean by blanket?

17 SPECIAL MASTER ESSHAKI: Across all the Honda
18 productions?

19 MR. O'SHEA: We are not opposed in principle.

20 SPECIAL MASTER ESSHAKI: What they are arguing is
21 they are concerned that it is their data and it's in the
22 possession of Honda. Honda is being forced to produce it
23 pursuant to the subpoena that was served upon them, and if
24 Honda fails to designate the data highly confidential,
25 attorneys' eyes only, that may give you free reign to do

1 whatever you wish with it.

2 MR. O'SHEA: Understood, and that's a very
3 reasonable point, Your Honor, so that's why I say we have no
4 objection in principle to proceeding like that. Simply to
5 emphasize that the sealing process would remain the same as
6 it is in Judge Battani's order and we would follow that
7 rather than flipping the sealing so that everything is
8 instantly sealed and then it is our burden to go forward.

9 You know what struck me in Mr. Raiter's
10 presentation was, and I even wrote down his words, virtually
11 the first words out of his mouth in describing the data was
12 that -- or the documents was, quote, it seems to be likely to
13 include, unquote. Well, that gets right to the heart of the
14 problem that I noted a few minutes ago, Your Honor, is we
15 don't know. And I don't know why we're being compelled or
16 suggested to make that decision or you're being compelled to
17 make that decision without having viewed the production. I
18 think the solution that you are talking about eliminates
19 their concern but it doesn't go so far as to violate the
20 Judge's order because Mr. Raiter says you can do this without
21 doing any damage to what Judge Battani has ordered, but the
22 truth is, if we don't follow the two-step process of having
23 the designation of sealing happen at the time of filing then
24 it is inevitably in conflict with the Judge's order. This
25 seems to get -- what we seem to be moving toward gets around

1 that issue, but again there doesn't seem to be an urgent
2 reason that I've heard to make a determination today without
3 having viewed the documents. We don't know what's in them,
4 we are now being told for the first time well, we think it
5 might include this data or that data, we think it is similar
6 to the OEM data that you dealt with earlier, we simply don't
7 know, and it would really help things along if we did. And
8 if their concern is that just producing the data as you say
9 is going to allow it to be used for any purpose by anyone, we
10 are very happy to stipulate to a process that will protect
11 it, and then we can, in the normal course of events if there
12 is a filing, then we can make a determination at that point.

13 SPECIAL MASTER ESSHAKI: Okay. Thank you, sir.

14 Well, I want to thank you all. The arguments were
15 very well prepared and well presented, and I do appreciate
16 the quality.

Again, I recall this vividly. The purpose of my
carve-out was when Honda said we are putting the ruling
regarding Honda's data on the record, Honda said, you know,
if we have to produce the data that we maintain on our
systems from the DMS of the dealers, that is their data, and
we don't feel comfortable producing this willy-nilly, and at
that point I said that the Honda dealers would be given an
opportunity to object to the production of their data
pursuant to my order that ordered Honda to produce its

1 information which included the DMS data of its dealers.

2 I believe that the protective orders in this case
3 are sufficient to protect this data. I would like counsel,
4 however, to take one step further because if we were dealing
5 with simply summaries of profits, summaries of costs, those
6 sorts of things, that would be one thing, but if we are
7 dealing with the name of a consumer, the VIN number, the
8 address, the zip code, whatever of the consumer, I have a
9 little more stringent concern, and as a consequence I'm going
10 to direct that we -- that an order be prepared in which all
11 of the data to be produced by Honda from the DMS information
12 on file from their dealers will be designated highly
13 confidential, attorneys' eyes only, and if per chance some of
14 that data gets through Honda and does not come with that
15 designation it will be assumed that it has the designation by
16 the receiving parties, and Honda and/or the auto dealer
17 plaintiffs will have the ability to call back any document
18 and stamp it with attorneys' eyes only and highly
19 confidential.

20 With respect to sealing the data in advance, I do
21 believe that flies in the face of the Judge's order.
22 Judge Battani is a very serious person, she thinks very
23 closely about her decisions. She, with the assistance of
24 counsel, crafted a solution that she believes is workable in
25 this case and fits within the parameters of the Shane

1 decision of the Sixth Circuit in order to protect against
2 future settlement objections because sufficient data wasn't
3 made available.

4 In essence indicating that there may be data that
5 should be protected, that should be filed under seal, or we
6 may never file any of this data indicates to me that we have
7 a ripeness issue and we really have a question of an advisory
8 opinion, which I am loath to engage in. I'm not going to
9 give an advisory opinion, and I don't think the Court should
10 go about making decisions as to whether data should be sealed
11 without having an actual controversy, and giving a blanket
12 sealing order, I think, flies in the face of the Judge's
13 order, flies in the face of Shane, and I'm simply not going
14 to do that. I would fall back on all the data will be
15 designated highly confidential, attorneys' eyes only. If it
16 slips through, it will be dealt with by the receiving parties
17 that way. The auto dealer plaintiffs will have a right to
18 come back and say we want to call it back and put that
19 designation on it if anybody objects.

20 I want that understood, if the auto dealer
21 plaintiffs say this document was not stamped highly
22 confidential, attorneys' eyes only, it is to be assumed that
23 it is. If the defendants says well, wait a minute, this is
24 not the type of document that should be designated highly
25 confidential, attorneys' eyes only, you need to notify the

1 auto dealer plaintiffs and they have the right to bring that
2 issue back up. I'm assuming we are not going to have that
3 problem because it's simply discovery. I will not issue a
4 sealing order in advance. I will not carve out or classify
5 data that should be subject to a sealing order. We will
6 address those if and when those issues arise.

7 So, Mr. O'Shea, the procedure is that you would
8 prepare an order to the best of your ability based upon my
9 rulings and, again, it should say that I am exercising the
10 discretion that has been conferred to me by the order
11 appointing me Special Master in reaching this decision, and
12 it should also contain the language -- the magic language
13 that is in my appointment order that says this order is
14 subject to appeal before Judge Battani pursuant to the order
15 appointing me Special Master. And would you circulate it to
16 opposing counsel, get their consent, and submit it for
17 submission? If there's no objection I will have it entered.
18 If there is, we will have to bring it up for a hearing.

19 MR. O'SHEA: Understood.

20 SPECIAL MASTER ESSHAKI: Ms. Romanenko, I see --

21 MS. ROMANENKO: Your Honor, we understand that at
22 such a time as there is a filing using the data, dealership
23 counsel may come in and make the motion to seal?

24 SPECIAL MASTER ESSHAKI: Yes, yes, you may. You
25 can put that as part of the order, that if there is a sealing

1 dispute you have the right to come in and seek that it be
2 sealed. Counsel?

3 MR. ROWE: Your Honor, not to be too pedantic, but
4 at least one of the auto dealers objected to producing the
5 data at all, and I think --

6 SPECIAL MASTER ESSHAKI: That objection is denied.

7 MR. ROWE: All right. Thank you.

8 SPECIAL MASTER ESSHAKI: All right. You can put
9 that in the order as well. Mr. O'Shea, anything else?

10 MR. O'SHEA: No, Your Honor.

11 SPECIAL MASTER ESSHAKI: Mr. Raiter?

12 MR. RAITER: No, Your Honor. Thank you.

13 SPECIAL MASTER ESSHAKI: Again, it was good to see
14 you all. Welcome to Detroit when there is a day of sunshine.
15 Thank you.

16 (Proceedings concluded at 2:12 p.m.)

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1 CERTIFICATION
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I, Robert L. Smith, Official Court Reporter of
the United States District Court, Eastern District of
Michigan, appointed pursuant to the provisions of Title 28,
United States Code, Section 753, do hereby certify that the
foregoing pages comprise a full, true and correct transcript
taken in the matter of Automotive Parts Antitrust Litigation,
Case No. 12-02311, on Monday, May 8, 2017.

10
11
12 *s/Robert L. Smith*
13 Robert L. Smith, RPR, CSR 5098
14 Federal Official Court Reporter
15 United States District Court
16 Eastern District of Michigan

17 Date: 05/19/2017
18 Detroit, Michigan

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